STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98 B 045

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GERALD JACKSON,

Complainant,

V.

DEPARTMENT OF HIGHER EDUCATION, UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER,

Respondent.

THIS MATTER was heard in evidentiary hearing before Administrative Law Judge Michael Gallegos on February 27, 1998 at 1120 Lincoln, 14th floor, Courtroom D, Denver, CO. Respondent was represented by Associate University Counsel Daniel Wilkerson. Complainant appeared and was represented by Nora V. Kelly, Attorney at Law.

MATTER APPEALED

Complainant appeals a disciplinary reduction in pay grade of two (2) steps for a period of three (3) months. For the reasons set forth below, <u>Respondent's actions are upheld.</u>

PRELIMINARY MATTERS

1. Exhibits

Admitted by stipulation were Respondent's Exhibits 19 and 21 and Complainant's Exhibits A through E with the exclusion of Exhibit A's pages 3 and 4.

Respondent's Exhibits 1 through 18 and 20 were admitted, over objection, as Records of Regularly Conducted Activity / Public Records and Reports, more commonly referred to as "Business records", under Colorado Rules of Evidence, Rule 803 (6) and (8).

After proper foundation was laid, Complainant's Exhibit A, pages 3 and 4 were admitted

without objection.

2. Witnesses

Complainant's motion to sequester the witnesses was granted without objection and Complainant's motion to take the testimony of Ms. Joyce Cashman out of order and via telephone (speaker phone) was granted without objection.

Respondent called the following witnesses: Medical Records Specialist Ms. Vanessa Edwards, Director of Human Resources Ms. Kathleen Dodaro, Manager of Breast and Cancer Unit Ms. Melissa Feig and Purchasing Manager Ms. Janet Burda.

Complainant testified on his own behalf and called the following witnesses: Director of Operations Ms. Joyce Cashman, and as character witnesses: Ms. Margaret Abeyta and Ms. Charlene Hancock.

ISSUES

- 1. Whether Complainant committed the acts for which he was disciplined;
- 2. Whether the actions of Complainant were so serious as to warrant disciplinary action;
- 3. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
- 4. Whether the person imposing the disciplinary action was properly authorized as the appointing authority;
 - 5. Whether complainant is entitled to an award of attorney's fees and costs.

FINDINGS OF FACT

- 1. Complainant Gerald Jackson has been employed by respondent University of Colorado Health Sciences Center as a Receiving, Shipping and Store Clerk since November 6, 1986.
- 2. On February 2, 1992 Mr. Jackson was issued a formal corrective action by Pharmacy Services Manager Ms. Patricia Chase listing areas in which Mr. Jackson was instructed to improve including "Jerry's rude and abrasive manner" and "conflicts with coworkers". (Exhibit 7.)
- 3. On December 15, 1995 Mr. Jackson was issued a formal disciplinary action by Associate Vice President of Operations Mr. Antonio B. Ruiz listing specific charges including "inappropriate interpersonal behavior (e.g. intimidation,...) and attempts to enflame racial animosities...". (Exhibit 15.)
- 4. Mr. Jackson appealed the disciplinary action of December 15, 1995 to both the Equal Employment Opportunity Commission (EEOC) and the Colorado Division of Civil Rights.

However, due to a clerical error, the one (1) step pay reduction for a period of three (3) months, imposed under the disciplinary action, never occurred. Therefore, being no adverse action to appeal, both the Colorado Division of Civil Rights and the EEOC claims were dismissed.

- 5. On January 11, 1997 Mr. Jackson was issued a formal corrective action by Materials Management Supervisor Mr. Wade Byerly listing areas in which Mr. Jackson was instructed to improve including Mr. Jackson's "abrasive and unprofessional manner" and use of "profane language". (Exhibit 3.)
- 6. On or about October 7, 1997 Mr. Jackson was informed by a co-worker, Barbara Tarasenko, about a statement, allegedly made by another co-worker, referring to Mr. Jackson as "Miss Jerry" or "Miss Jackson, the laundry boy". Mr. Jackson was offended by this reference because he took it to imply that he was homosexual.
- 7. Mr. Jackson inquired of other coworkers regarding the source of the comment and/or if anyone had heard a rumor that he was "gay" (homosexual). Specifically, he asked Medical Records Specialist Ms. Vanessa Edwards if she had heard the rumor. He told Ms. Edwards that he was going to "whoop some ass" when he found out who started the rumor. He stated that he thought a nurse, "Suzanne", had started the rumor because "they" were always laughing at him and pointing at him. Later Mr. Jackson told Ms. Edwards he believed "Sonya" (Evans) had started the rumor. He asked Ms. Edwards where Sonya lived and stated he was going to find out where she lived and "get to the bottom of this".
- 8. Mr. Jackson attempted to contact his supervisor Ms. Romona Jackson-Jones regarding his concerns about the comment and possible rumors. He was informed by her office that she was out for some dental work and might be out for another two or three days. He then went to the office of the Manager of the Breast and Cancer Unit, Ms. Melissa Feig. However, Ms. Feig was not in her office.
- 9. The next morning Mr. Jackson went to office of Executive Vice President Ms. Joyce Cashman regarding the comment and possible rumors. He was concerned but cordial and polite. She advised him to speak with someone in Human Resources about the comment and possible rumors.
- 10. On or about October 8, 1997 Mr. Jackson met in person with Director of Human Resources Ms. Kathleen Dodaro and Ms. Melissa Feig. They met in his office regarding the report of the comment and possible rumors about Mr. Jackson. Ms. Dodaro and Ms. Feig agreed to investigate. Mr. Jackson commented that he might "deck" someone who made such a comment. Both Ms. Dodaro and Ms. Feig advised Mr. Jackson that such action would be inappropriate but neither felt threatened by him or in fear of him.
- 11. Ms. Edwards reported to Ms. Feig that she had concerns about Mr. Jackson trying to find out where Sonya Evans lived. Ms. Evans was also concerned. Ms. Evans denied referring to Mr. Jackson as "Miss Jerry", "the laundry boy" or "Miss Jackson". Ms. Tarasenko (See paragraph 6. above) reported to Ms. Feig that she had concerns regarding Mr. Jackson because he was "always

there" when she went "to smoke or get a soda-pop or anywhere". Ms. Feig arranged to have Ms. Jackson-Jones, Mr. Jackson's supervisor, interview each of the three women as part of the investigation.

- 12. Later that day Ms. Dodaro received a call from Mr. Jackson in which he stated that he had overreacted, Melissa (Ms. Feig) had handled the situation and there was no further need to investigate.
- 13. On or about the morning of October 9, 1997, Ms. Edwards was coming in the back door (to the building) and was surprised to find Mr. Jackson inside the door. Usually there was no one at the back door at that time of day. Mr. Jackson asked Ms. Edwards if she had "heard anything". She responded "No". He indicated to her that he was upset that she had met with his supervisor. Mr. Jackson then stepped in front of the door to her office, blocking her entrance. He began talking *at* her, saying he was "tired of all these 'niggas' at my back". He wanted to know who turned him in. He used profane language. She became frightened that he would physically harm her.
- 14. Ms. Edwards reported the incident to Ms. Feig who reported it to Ms. Dodaro. Ms. Dodaro reported the incident to interim Director of Materials Management Ms. Janet Burda and requested that Mr. Jackson be removed from the premises. Ms. Burda then arranged a conference call with Mr. Jackson's supervisor, Ms. Jackson-Jones and Mr. Jim Hidahl, UCHSC Personnel Services Department.
- 15. At the direction of Ms. Burda, Mr. Jackson was removed from the premises by security officers. Mr. Jackson was advised not to return pending action by Ms. Burda.
- 16. Ms. Edwards was so frightened by the incident on October 9, 1998 that she altered her arrival time at work to avoid any possibility of running into Mr. Jackson. She chose not to go to the soda-pop machine alone, stopped walking to Rose Hospital and waited for her husband to come into the building to get her at the end of each work day.
- 17. Ms. Burda scheduled a Rule 8-3-3 meeting, regarding the incident, for October 22, 1997 and informed Mr. Jackson by letter which she hand-delivered to him at his home on October 17, 1997.
- 18. The scheduled 833 meeting was held on October 22, 1997. At that meeting Mr. Jackson denied having made any of the comments or taking any of the actions of which he was accused. Ms. Burda considered his denials and his employment history in assessing his credibility. Specifically Ms. Burda considered prior corrective actions and the January 1997 disciplinary action, when they occurred and "the intensity" of each occurrence. She reviewed each of his evaluations. She considered that there were never issues with regard to work performance, i.e. other than interpersonal and communications issues, he was a good employee (See Complainant's Exhibits C, D and E.) and, in 1993, received a "commendable" rating on an evaluation (Complainant's Exhibit B). She also considered oral reports of the October 9, 1997 incident.
 - 19. Ms. Burda concluded that Mr. Jackson's behavior of October 9, 1997 constituted

willful misconduct. On October 31, 1997, based on her findings from the 833 meeting on October 22, 1997, Ms. Burda imposed the discipline of a two (2) step reduction in pay for a period of three (3) months.

- 20. Ms. Burda was the properly delegated appointing authority to impose disciplinary action.
- 21. The pay reduction amounted to approximately \$620.00 (Six Hundred and Twenty dollars and no cents).
 - 22. Complainant filed a timely appeal of the disciplinary action on November 4, 1997.

DISCUSSION

The burden is upon respondent to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. *Metro Moving and Storage Co. v. Gussert*, 914 P. 2d 411 (Colo. App. 1995).

Respondent argues that it met its burden both with regard to 1.) whether or not the act occurred and 2.) whether just cause warrants the discipline imposed. Respondent presented significant evidence regarding occurrence of the act, through the testimony of Ms. Edwards, Ms. Feig and Ms. Dodaro.

Complainant challenged the credibility of each of Respondent's witnesses by calling character witnesses, and through the testimony of Complainant himself. Complainant specifically challenged Ms. Edwards' credibility through the testimony of Complainant's character witnesses regarding their observations of Ms. Edwards in the waiting area outside the hearing room. Each of the character witnesses testified that Ms. Edwards appeared overly nervous and "paranoid".

Yet determination of credibility and the weight to be given testimony is strictly within the province of the trier of fact, in this case the administrative law judge, to the extent that such determinations will not be disturbed on appeal. *Charnes v. Lobato*, 743 P.2d 27 (Colo.1987). The administrative law judge also observed Ms. Edwards, on the witness stand, on the day of hearing and found her to be a credible witness. Complainant's character witnesses were credible with regard to testimony about their experiences with and knowledge of Complainant but not with regard to their observations of Ms. Edwards. Ms. Feig and Ms. Dodaro were also credible witnesses.

Substantial evidence, including Respondent's Exhibits 1 through 21 and Complainant's Exhibits A through E, demonstrate convincingly that the act occurred. This determination is based, in part, on credibility assessments made by the administrative law judge (above), exhibits and Complainant's observed demeanor at hearing. Complainant testified in a calm, polite fashion. The totality of the evidence indicates that Complainant can be very polite and usually presents a calm

demeanor. (See Complainant's Exhibit A.) However, he can be and, as evidenced by his personnel history, has been on occasion abrasive, rude, intimidating and profane. (See Findings of Fact 2. Through 5., above.) Therefore Complainant's denials at hearing were not convincing. The totality of evidence presented at hearing weighs more heavily toward the occurrence of the act.

Respondent's Exhibits 1 through 21 to support respondent's argument that just cause warrants the discipline imposed. Ms. Burda's decision to impose discipline of a two (2) step reduction in pay for a period of three (3) months was based on review of complainant's personnel file, including prior corrective actions, a prior disciplinary action and evaluations, her assessments of credibility at the 833 meeting and the nature of this incident. The evidence presented at hearing supports Ms. Burda's decision and that the discipline she imposed was logically in line with principles of increased discipline, i.e. there was both a factual and a legal basis for her decision. Substantial evidence weighs toward the determination that her decision in this matter was neither arbitrary or capricious.

Complainant questioned whether Ms. Burda was properly authorized as the appointing authority. Ms. Burda testified, at hearing, that she was. Complainant presented no evidence to challenge Ms. Burda's testimony that she was properly authorized as the appointing authority..

CONCLUSIONS OF LAW

- 1. Purchasing Manager Ms. Janet Burda was the appointing authority for purposes of imposing discipline in this matter.
- 2. Respondent's action was not arbitrary, capricious or contrary to rule or law, i.e. there was a factual basis, the act occurred, and the discipline imposed was reasonable and logically in line with principles of progressive discipline.
- 3. Complainant is not entitled to an award of attorney's fees and costs.

ORDER

The action of the respondent is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this 19TH day of MARCH 1998 at Denver, Colorado

Michael Gallegos Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is <u>\$50.00</u> (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An

original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

CERTIFICATE OF MAILING

This is to certify that on thisday of MARCH, 1998, I placed true copies of the foregoing ORDER in the United States mail, postage prepaid, addressed as follows:
Nora V. Kelly Nora V. Kelly, P.C. 1775 Sherman St., Suite 1775 Denver, Co 80203

Daniel Wilkerson University of Colorado - HSC 4200 E. Ninth Avenue Campus Box A-077 Denver, CO 80262